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Supreme Court
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In The
Supreme Court of the United States

DAGOBERTO MALDONADO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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May, 2004

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT/PETITIONER'S MOTION TO SUPPRESS BY CONCLUDING THAT EVEN THOUGH THERE WAS A FOURTH AMENDMENT VIOLATION OF DEFENDANT/PETITIONER'S RIGHTS, DEFENDANT/PETITIONER'S SUBSEQUENT CONSENT WAS AN INDEPENDENT ACT OF FREE WILL WHICH DISSIPATED THE TAINT ON THE PHYSICAL EVIDENCE DISCOVERED DURING THE SEARCH.

II. WHETHER THE TRIAL COURT ERRED BY DENYING DEFENDANT/PETITIONER A THREE LEVEL DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY UPON FINDING DEFENDANT/PETITIONER HAD FALSELY DENIED ADDITIONAL RELEVANT CONDUCT.

III. WHETHER THE TRIAL COURT ERRED BY SENTENCING DEFENDANT/PETITIONER TO A TWO LEVEL UPWARD ADJUSTMENT FOR OBSTRUCTION OF JUSTICE.

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OPINION BELOW

The Court of Appeals for the Fifth Circuit entered its judgment February 23, 2004 sustaining the judgment of the trial court. A copy of the appellate court's judgment, and a copy of the trial court's memorandum and order are annexed in the appendix.

JURISDICTION

On February 23, 2004 the court of appeals for the Fifth Circuit entered its judgment (Apx. A) affirming the district court. Jurisdiction to review the judgment of the court of appeals is conferred upon this court by 28 U.S.C. Section 1254.

STATEMENT OF THE CASE

Defendant/Petitioner, DAGOBERTO MALDONADO, JR., was indicted on a four-count indictment. Count One alleged a conspiracy to launder money, and Counts Two and Three were substantive money laundering counts. Count Four was a forfeiture count wherein the government sought forfeiture of $1,840,000.00 of U.S. currency.

The trial court heard and denied Defendant/ Petitioner's Motion to Suppress. Subsequently, Defendant/ Petitioner, Dagoberto Maldonado, Jr., conditionally conceded his guilt on all three counts, and also agreed and stipulated to the forfeiture in Count Four of the indictment. On March 17, 2003 Defendant/Petitioner was sentenced to 168 months to serve concurrent on Counts 1, 2 and 3. The trial court entered a final order of forfeiture for $1,840,000 dollars upon Defendant/Petitioner's consent. The 168-month sentence imposed by the court included a two level enhancement for obstruction of justice, and did not include a three level downward adjustment for acceptance of responsibility. Defendant/Petitioner Dagoberto Maldonado, Jr., is presently in custody serving his sentence. The three issues on appeal are whether the trial court erred by: denying Defendant/Petitioner's Motion to Suppress; denying Defendant/Petitioner's acceptance of responsibility; and enhancing the Defendant/Petitioner's sentence by two levels for obstruction of justice.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI RELEVANT FACTS

Defendant/Petitioner, Dagoberto Maldonado, Jr., filed a 16-page pretrial motion (citing pertinent case law) seeking to suppress money, jewelry, computers, and other tangible items seized by the agents on April 4, 2002 from Defendant/Petitioner's home.

The trial court heard testimony from nine witnesses and the arguments of counsel at the suppression hearing. At the suppression hearing, prior to any testimony, Defendant/ Petitioner's counsel informed the court that Defendant/ Petitioner's consent was tainted because it was obtained after he was taken from the courtyard of his home.

In the instant case, the Fifth Circuit in its February 23, 2004 opinion affirmed the trial court's finding that Defendant/Petitioner's signing of a consent to search form constituted an intervening circumstance that dissipated the taint of the prior Fourth Amendment violation. As per *Brown v. Illinois,* 422 U.S. 590 (1975) the signing of a consent form is a factor that goes to determining the voluntariness issue of a consent. It is a factor that addresses the first prong of the two-step analysis established in *Brown v. Illinois*. The first prong is the voluntariness issue and the second prong is the causal connection test. The voluntariness of the consent was not an issue as to Defendant/Petitioner, for he conceded the first prong (voluntariness issue) in appellant's brief. Both the trial court and the Fifth Circuit erroneously relied on the Defendant/Petitioner's signing of the consent form to

conclude that the second prong (causal connection test) established by *Brown v. Illinois* was satisfied.

This error in the Fifth Circuit's opinion of February 23, 2004 is evident by their citing of *U.S. v. Kelley*, 981 F.2d 1464, 1471-72 (1993) as authority. A reading of *U.S. v. Kelley* reveals it relies on *U.S. v. Fike*, 449 F.2d 191 (5th Cir. 1971) for authority even though the Fifth Circuit had previously acknowledged that *U.S. v. Fike*, had been displaced by *Brown v. Illinois*. This acknowledgment that *Fike* has been displaced by *Brown v. Illinois* is found in *U.S. v. Pierre*, 932 F2 377, 388 (5th Cir. 1991).

Defendant/Petitioner's counsel called officer Rivera as the first witness at the suppression hearing. Officer Rivera testified that the officers had no information as to Defendant/Petitioner, Dagoberto Maldonado, Jr., prior to April 4, 2002. That he arrived at the vicinity of Defendant/Petitioner's home (126 Beltran Loop) at around noon. That the five members of his unit were already there on surveillance.

That he was utilizing his binoculars while on surveillance. That the backyard of the home is completely sealed off from view by a roof and cinder block fence. That no portion of the backyard is visible from the street. That no portion of the backyard is visible to a salesman from the front door of Defendant/Petitioner's home. That during his entire surveillance he was unable to see activity in the backyard/courtyard. That when he went into the covered driveway he met two individuals from whom he obtained drivers licenses for identification. He admitted to having no reason for not asking the two individuals to summon the owner of the home. That he was armed with his revolver.

That he went past the front door without knocking, and proceeded to the courtyard/backyard.

By this time officer Rivera already knew that his co-officers had stopped co-defendant Juan Ramos after Ramos had left Defendant/Petitioner's home. That Ramos had been stopped about a one-half (½) mile away from Defendant/Petitioner's home, and that incriminating evidence had been found by his co-officers in Ramos' spare tire. See page one of trial court's memorandum and order in appendix. (Apx. B)

At the suppression hearing officer Rivera was asked why he did not attempt to obtain a search warrant based on that information. His answer was simply because he was not in charge. That officer Hernandez had decided to abandon their surveillance positions, and approach Defendant/Petitioner's home. Officer Rivera told the court that about 10 minutes lapsed from the time he approached Defendant/Petitioner's home to the time Defendant/ Petitioner signed the consent form. Co-officer Hernandez testified that on April 4, 2002 officers had co-defendant Ramos under surveillance, and followed him to Defendant/ Petitioner's home at 126 Beltran Loop. That after co-defendant Ramos left Defendant/Petitioner's home, his co-officers followed Ramos, but that he and co-officer Rivera continued their surveillance of Defendant/Petitioner's home. That minutes later, his co-officers radioed that they had gotten the load from Ramos. That he and officer Rivera arrived at Defendant/Petitioner's home in separate cars at about the same time. That the officers believed they had probable cause to search Defendant/Petitioner's home, but they wanted to get consent nonetheless.

Officer Hernandez further testified that if the owner of the home at Beltran Loop (Defendant/ Petitioner) had refused consent a search warrant could undoubtedly be obtained. That it would have taken no more than 2 hours to obtain a search warrant for Defendant/Petitioner's home. That it took him and officer Rivera only 5 to 8 minutes to get consent from Defendant/Petitioner. Officer Hernandez admitted he had no permission to go onto the premises of Defendant/Petitioner's home. During Hernandez testimony the trial court in fact agreed that when the officers approached the home they had already decided they were going to search. Officer Hernandez admitted no effort was made to obtain a search warrant before approaching Defendant/Petitioner's home.

Melissa Maldonado, Defendant/Petitioner's wife, also testified at the suppression hearing. She testified that she lives at 126 Beltran Loop, and that she was home when officer Rivera arrived on April 4, 2002. That she and Mrs. Benavides, an acquaintance, were standing in the front of her home when officer Rivera arrived. That officer Rivera went on to the premises without requesting permission of anyone. That he walked past the door without knocking, and went to the backyard/courtyard for 3 to 5 minutes. That officer Rivera returned from the courtyard holding Defendant/Petitioner by the arm. That she and Mrs. Benavides were about 10 feet away from where officer Rivera was questioning Defendant/Petitioner. That she heard officer Rivera threaten Defendant/Petitioner with taking the women and children into custody if he did not sign the consent form. That after the threat Defendant/ Petitioner signed the consent form.

Mrs. Benavides similarly testified at the suppression hearing. She testified that she was present at 126 Beltran Loop when officer Rivera arrived, and that he ordered them to move from the front yard onto the street. That officer Rivera walked past the door to the home without knocking, and proceeded to the courtyard in the rear. That about 5 minutes later officer Rivera returned from the courtyard holding Defendant/Petitioner by the arm. That officer Rivera and Defendant/Petitioner were arguing. That officer Rivera and Defendant/Petitioner were raising their voices while arguing. On cross-examination she testified that though officer Rivera and Defendant/Petitioner were arguing that she did not specifically hear the threat because she returned to her vehicle because her baby was cold.

Defendant/Petitioner also testified at the suppression hearing that he was in his backyard/courtyard when he first saw officer Rivera who was armed. Defendant/Petitioner testified he was surprised to suddenly see officer Rivera. That officer Rivera had walked all the way down the driveway into his backyard. That he, Defendant/Petitioner, was standing next to his barbecue pit which is shown in the photograph, government's exhibit 3. That officer Rivera took him by the arm to the front of the house. That he and officer Rivera argued for about 15 minutes before he signed the consent form. That officer Rivera told him that everyone would be held if he did not sign. He testified that but for Rivera's threat he (Defendant/Petitioner) would not have signed.

The case agent, Daniel Gleckman, also testified at the suppression hearing. He testified that it is his job to interview the officers, to get their story, and to coordinate

the investigation. That he prepared an offense report. That he had interviewed Mrs. Benavides some time before she testified at the suppression hearing, and that Mrs. Benavides had heard the officer say he could get a search warrant just like that – snapping his fingers. That Mrs. Benavides had told him that officer Rivera had gotten upset. That Mrs. Benavides had also told him that officer Rivera was raising his voice.

Once the evidence was concluded, Defendant/ Petitioner's counsel, at the suppression hearing, suggested to the court that it should first determine the existence of a fourth amendment violation, and second, whether the consent which came on the heels of the fourth amendment violation served to dissipate the Fourth amendment taint. During the suppression hearing, Defendant/Petitioner's counsel also informed the court that a conditional plea was likely if the suppression was denied.

On October 18, 2002 though the trial court found a Fourth amendment violation, it denied the motion to suppress.

Consequently, Defendant/Petitioner sought to enter a conditional plea of guilty before the court, but an un-contested bench trial was required because the Government would not agree to a conditional plea. The bench trial transcript consists of 6 pages in its entirety.

Defendant/Petitioner signed a stipulation of facts as to the evidence as to all four counts of the indictment. This included count four which was the forfeiture of $1,840,000.00 dollars. Defendant/ Petitioner did not contest the government's stipulated evidence, and neither side

presented any witnesses whatsoever. The signed stipulation of facts for the bench trial contains language that both parties are preserving their right to appeal the court's fourth amendment ruling. The trial court accepted the stipulation, and found the Defendant/Petitioner guilty as to all counts.

On March 17, 2003 Defendant/Petitioner was sentenced to 168 months to serve to run concurrent on all counts. The probation office filed a pre-sentence report, and Defendant/Petitioner's fourth objection contested the recommended two-level increase for obstruction of justice. The other pertinent objection by Defendant/Petitioner was objection five denying Defendant/Petitioner a 3 level reduction for acceptance of responsibility. At the conclusion of the sentencing hearing the trial court denied Defendant/Petitioner any reduction for acceptance of responsibility finding that Defendant/Petitioner had falsely denied additional relevant conduct based on officer Elizondo's testimony. The trial court also gave Defendant/Petitioner a two level increase for obstruction of justice finding Defendant/Petitioner had lied on numerous occasions during the suppression hearing.

ISSUE ONE

I. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT/PETITIONER'S MOTION TO SUPPRESS BY CONCLUDING THAT EVEN THOUGH THERE WAS A FOURTH AMENDMENT VIOLATION OF DEFENDANT/PETITIONER'S RIGHTS DEFENDANT/PETITIONER'S SUBSEQUENT CONSENT WAS AN INDEPENDENT ACT OF FREE WILL WHICH DISSIPATED THE TAINT ON THE PHYSICAL EVIDENCE DISCOVERED DURING THE SEARCH.

ARGUMENT

Defendant/Petitioner Maldonado having been sentenced to 168 months to serve reserved the right to appeal the district court's order denying his Motion to Suppress evidence. In reviewing a denial of a motion to suppress, this court reviews the district court's factual findings for clear error and the court's ultimate conclusions on fourth amendment issues drawn from those facts *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The court reviews all of the evidence introduced at a suppression hearing in the

light most favorable to the prevailing party.[1] *United States v. Orozco*, 191 F.3d 578, 581 (5th Cir.1999).

Defendant/Petitioner Maldonado does not contend that his consent to the search was not voluntary. Instead, he contends that it was not an independent act of free will which purged the fourth amendment violation. Consent to search may, but does not necessarily, dissipate the taint of a fourth amendment violation. *United States v. Chavez-Villlarreal*, 3 F.3d 124, 127 (5th Cir. 1993).

The standard for resolving these attenuation-purge questions is provided by *Brown v. Illinois*, 422 U.S. 590 (1975). The court in *Brown,* adopted a multi-factor test to determine whether the fruit of an unconstitutional violation should be suppressed. In *Brown*, the Supreme Court held that Miranda warnings did not cleanse the taint of a confession made pursuant to a fourth amendment violation.

Three factors have been distilled from *Brown* to evaluate the connection between the constitutional violation and the subsequent acquisition of evidence: (1) the temporal proximity of the illegal conduct and the

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[1] Defendant/Petitioner Maldonado was the prevailing party as to the court's findings and conclusion that officer Rivera violated Defendant/Petitioner's Fourth Amendment rights by entering the curtilage of Defendant/Petitioner's home. Including the district court's finding that the officers made no effort whatsoever to obtain a search warrant prior to entering Defendant/Petitioner's curtilage to question him, and the district court's finding that no exigent circum-stances existed whatsoever. However, Defendant/ Petitioner was not the prevailing party as to the court's findings and conclusion that Defendant/Petitioner's subsequent consent to search was an independent act of free will that dissipated the taint.

discovery of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. See id. At 603-04, 95 S.Ct. 2254; *United States v. Vega*, 221 F.3d 789, 801-02 (5th Cir.2000) (applying the test to find that consent did not purge the taint of an unlawful search); *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 (5th Cir.1993) (applying the test to find coerced consent did not purge the taint of an unlawful stop); *United States v. Miller*, 608 F.2d 1089, 1102-03 (5th Cir.1979) (applying the test to physical evidence).

Under the fruit of the poisonous tree doctrine, all evidence derived from the exploitation of an illegal search or seizure must be suppressed, unless the government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the constitutional violation. See *Brown v. Illinois* 422 U.S. 590,597-603, 95 S.Ct. 2254, 2259-2261, 45 L.Ed.2d 416 (1975) (discussing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)[2].

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[2] Explaining its earlier attenuation holding in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the *Brown* Court contrasted two types of "intervening circumstances" that arose in that case. In *Wong Sun*, the initial arrest without probable cause of James Wah Toy led to the questioning and eventual discovery of narcotics in Johnny Yee's home. This discovery, in turn, led to the arrest of Wong Sun. After arraignment Wong Sun was released, but later voluntarily returned to give an incriminating statement to police. The Supreme Court held that this act of returning was an intervening circumstance, thus dissipating the taint of the original illegal arrest. However, the court also held that the discovery of physical evidence (narcotics) as a direct result of Toy's initial illegal arrest was not attenuated, and "did not result from an intervening independent act of free will," and thus "was

The burden on the prosecution to show that consent to a search was voluntary is significantly heavier when it follows a constitutional violation. See *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 (5th Cir. 1993).

A reading of the district court's memorandum and order (Apx. B) reveals it utilized the pertinent three-prong inquiry citing *United States v. Dortch*, 199 F.3d 193, 202 (1999). In its memorandum and order the district court found that the temporal proximity factor favored the defendant because by the officers own testimony only minutes elapsed between the fourth amendment violation, and Defendant/Petitioner's consent. Therein, the district court decided the second factor (intervening circumstances), and the third factor (purpose and flagrancy of the misconduct) in favor of the government.

Thus, the district court denied Defendant/ Petitioner's motion to suppress cash, computers, jewelry, and ledgers discovered by the officer's search of Defendant/ Petitioner's home.

At page 11 of the memorandum and order (Apx. B) the district court concluded that the signing of the consent form, which contained a clause informing Defendant/ Petitioner of his right to refuse consent, was a purging intervening circumstance. Upon a de novo review, this conclusion is wrong for several reasons. One, the signing of a consent form knowing that one has a right to refuse is

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not sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Brown*, 422 U.S. at 598, 95 S.Ct. 2254 (quoting *Wong Sun*, 371 U.S. at 486, 83 S.Ct. 407). In accord, *United States v. Ceccolini*, 435 U.S. 268, 275 (1978).

an event simultaneous with Defendant/Petitioner giving his consent, and is not an intervening circumstance. More significantly, the district court's analysis specifically contravenes this court's decision in *Brown v. Illinois*, and decisions of the Fifth Circuit issued subsequent to *U.S. v. Dortch*.

The Supreme Court in *Brown v. Illinois*, Id., held that the giving of Miranda warnings, on two separate occasions, prior to the defendant signing a confession was insufficient to purge the fourth amendment violation. In *U.S. v. Chavez-Villarreal*, 3 F.3d 124 at 126 the defendant similarly consented, and signed a consent form but that did not constitute an intervening circumstance. The court so held even though the agents told Chavez-Villarreal he had the right to refuse consent to search before he signed the consent to search form. *U.S. v. Chavez-Villarreal*, 3 F.3d 124 at 128 (1993). As recently as last year, the Fifth Circuit decided *U.S. v. Santiago*, 310 F.3d 336 (2002). Therein at page 338 it noted that the defendant motorist (Santiago) read and signed a consent search in Spanish after the fourth amendment violation. That did not constitute an intervening circumstance, and it held the consent was not an independent act of free will to purge the fourth amendment violation. Both of these Fifth Circuit decisions involved signed consents after fourth amendment violations in relation to automobile stops on public highways. In the case at bar, the Defendant/Petitioner Maldonado signed the consent after a Fourth amendment violation occurred at his home.

At pages 11 and 12 of the memorandum and order (Apx. B) the district court also considered the third factor, that is, the purpose and flagrancy of the officer's

misconduct. After noting that the officer had encountered no incriminating evidence, during his intrusion, and that the officer did not intend to completely ignore the Fourth amendment, the district court concluded this third factor weighed in favor of the government. Upon a de novo review this conclusion is also wrong for various reasons.

The district court pointed out in its memorandum and order (Apx. B) that " illegal police intrusion into private areas of a residence" should not be minimized, and that "the officer should have been aware that he was in an area with a high expectation of privacy."

Officers Rivera and Hernandez, who were the first two officers who went onto Defendant/Petitioner's home, testified at the suppression hearing. They testified that no efforts were made to obtain a search warrant before approaching Defendant/Petitioner's home. That they did not ask for permission to go onto the premises. That the purpose for going onto the premises to seek Defendant/ Petitioner was to obtain his consent to search. That two individuals on the premises were approached for identification, and their driver's licenses were obtained. When asked why he did not ask the two individuals to summon Defendant/Petitioner, officer Rivera stated he had no reason. The officers continued to keep the two individuals in place while officer Rivera proceeded to Defendant/ Petitioner's courtyard. The officers further testified that if Defendant/Petitioner had refused consent they had no doubt they would have obtained a search warrant within two hours. Even the district court agreed at the suppression hearing that the officers had already made up their minds they were going to search before intruding on Defendant/ Petitioner's home. Even the government at the suppression

hearing admitted the agents "wanted a search based on what they found in the tire."

The evidence at the suppression hearing also showed that officer Rivera did encounter incriminating evidence upon his illegal intrusion onto Defendant/ Petitioner's home. For one, officer Rivera encountered the Defendant/Petitioner himself who was the target of their intrusion. Without the Defendant/Petitioner, officer Rivera could not have obtained the consent he sought. Moreover, Defendant/Petitioner's computer[3] was on a table in plain view when officer Rivera illegally intruded onto Defendant/Petitioner's backyard/ courtyard.

The district court's conclusion, under the facts in this case, that the flagrancy of the officer's conduct militated in favor of the government contravenes the court's decision in *U.S. v. Hernandez*, 279 F.3d 302 (2002). The *Hernandez* case involved an officer pressing upon the outside of defendant's suitcase at a public bus station, prior to the defendant consenting to the search which revealed drugs. Defendant-Hernandez pled guilty to possession with the intent to distribute. However, prior to her sentencing, the United States Supreme Court decided *Bond v. United*

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[3] This is the password secured computer the officers accessed prior to obtaining a federal search warrant, and to which the government stipulated. (SROA Vol. 2 page 120). At the suppression hearing the district court was satisfied that the computer was accessed prior to the federal warrant being issued to search the computer. (SROA Vol. 3 page 105). The district court in its memorandum and order (Apx. B) stated that since the computer was accessed prior to the issuance of the search warranty it assumed that would be another fourth amendment violation. (R.E. page 162).

States, 529 U.S. 334, 335, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000) holding that a "law enforcement officer's physical manipulation of a bus passenger's carry-on luggage violated the fourth amendment's proscription against unreasonable search." As a result, the district court allowed Hernandez to withdraw her guilty plea. Therein the court found that the officer's conduct was not flagrant because the officer could not have predicted the Supreme Court's ruling in *Bond v. United States*. Nonetheless, the court concluded that the causal connection between the violation and the consent was not broken.

In the case at bar, the district court found that officer Rivera's illegal intrusion by going on the premises without permission, and by passing the entrance door to Defendant/Petitioner's home, and proceeding onto Defendant/Petitioner's courtyard violated existing case law. Officer Rivera had already made up his mind he was going to search when he intruded onto the curtilage of Defendant/ Petitioner's home. Additionally, officer Rivera's intrusion was on the private area of Defendant/Petitioner's home, and not at a public bus station. Moreover, it is undisputed in the instant case that officer Rivera abandoned his safe surveillance position, without exigent circumstances, to intrude onto Defendant/Petitioner's premises without a search warrant.[4]

Officer Rivera's was calculated to knowingly intrude upon Defendant/Petitioner's home without necessity or justification.

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[4] Officers testified a search warrant could have been obtained in 2 hours (SROA Vol. 3 page 28). Officer Rivera could state no reason as to why he simply did not ask the two individuals he encountered to summons Defendant/Petitioner. (SROA Vol. 3 page 28).

II. WHETHER THE TRIAL COURT ERRED BY DENYING DEFENDANT/PETITIONER A THREE LEVEL DOWNWARD ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY UPON FINDING DEFENDANT/PETITIONER HAD FALSELY DENIED ADDITIONAL RELEVANT CONDUCT.

ARGUMENT

In the Fifth Circuit it is recognized that in reviewing the court's determination of acceptance of responsibility, the appellate courts give more deference to the findings than would be given under the clearly erroneous standard. Nonetheless, failure to grant a downward adjustment for acceptance of responsibility constitutes reversible error when the decision is made without any foundation. See *U.S. v. Pierce*, 237 F.2d 693 (5th Cir.2001) citing *U.S. v. Patino-Cardenas*, 85 F.3d at 1133, 1136 (5th Cir.1996). Pursuant to 18 U.S.C. Section 3742 (A)(2), the Defendant/ Petitioner asserts that the court below committed error by failing to follow guideline commentary, and case law thereby incorrectly applying the guideline section involved.

Under U.S.S.G. Section 3E1.1, a defendant is entitled to adjustment for acceptance of responsibility if he effectively (1) admitted to the conduct comprising the offense of conviction and (2) admitted or did not falsely deny additional relevant conduct, for which he was accountable. The Fifth Circuit has held that a defendant is not required to volunteer or affirmatively admit relevant conduct beyond the offense conviction, however he must not falsely deny or frivolously contest relevant conduct that

the court determines to be true. See *Patino-Cardenas,* at 1135.

Defendant/Petitioner directs the Court's attention to the "agreed to factual basis" prepared by the government and signed by Defendant/Petitioner, the PSR filed by the probation department and the PSR addendum, the Defendant/Petitioner's objections to the PSR and the fact that no objections and/or responses were filed by the government. The six-page stipulation of facts outlines all of the offense conduct that supports each and every count of conviction to which Defendant/Petitioner pled guilty. The factual stipulations specifically state the following, "the U.S. Attorney's Office, the Defendant/Petitioner, and defense counsel, stipulate and agree that if called to testify, the government's witnesses would testify to facts set forth herein. The parties further stipulate and agree that the Defendant/Petitioner would offer no evidence to contradict the facts set forth herein." The remaining six pages then go into specific detail as to the events and parties involved and the facts supporting the counts contained in the indictment. Clearly the Defendant/Petitioner admitted to all conduct comprising the offense charged, through his admission of the facts contained in the factual basis. Defendant/Petitioner's acceptance is further evidenced by Defendant/Petitioner not presenting any evidence or witnesses whatsoever at the stipulated bench trial.

The sentencing transcript reflects the district court elected not to grant Defendant/Petitioner acceptance based on the testimony of agent Elizondo who testified at the sentencing hearing. It should be noted that at no time prior to the sentencing had the government, or the probation department either through direct examination or documents

confronted the Defendant/Petitioner with the allegations that were revealed through Ms. Elizondo's testimony. The only mention of any reference to the allegations as revealed through Ms. Elizondo's sentencing testimony was noted in paragraph 10 of the PSR. However, when reviewing the Defendant/Petitioner's objections to the PSR, the Defendant/Petitioner offers no objection to the allegation and simply does not address item 10, thereby not falsely denying or frivolously contesting the issue. The Defendant/Petitioner's lack of response to Ms. Elizondo's testimony and the reference to the allegations made by that testimony were contained in item 10 of the PSR. It is clear from the transcript that the district court was focused on whether Defendant/Petitioner had complied with application note one of the U.S.S.G. Section 3E1.1.

The Fifth Circuit has addressed that very issue in a case that is factually analogous. In *U.S. v. Patino-Cardenas*, 85 F.3d 1133 (5th Cir.1996) the defendant submitted a written statement in which he accepted responsibility for his conduct and admitted his guilt. In *Patino* the probation department and the government took issue with the fact that Patino failed to state in his written statement that he had also transported other aliens to Houston, that he had negotiated for the alien's release, and had collected fees for the release of other aliens. The counts to which *Patino* pled were specific as to factual detail and did not encompass any of the facts being raised by the probation department or the government. Thus, the facts raised by the probation department constituted additional relevant conduct which differs from the offense conduct. The court's holding in *Patino* noted that *Patino* did not object to the facts alleged in the PSR, and thus did not deny the allegations being claimed by the PSR and/or

the government as noted in his PSR objections and sentencing colloquy. In the case at bar, Defendant/ Petitioner was simply asking the probation and the government to be specific as to what false statements had been made by the Defendant/Petitioner. In fact, Defendant/ Petitioner invited the district court to address the Defendant/Petitioner directly at sentencing if the court felt it needed an additional admission from the Defendant/ Petitioner. As in *Patino*, Defendant/Petitioner did not have the obligation to admit conduct beyond the charged offense, his only duty was to not falsely deny or frivolously contest relevant conduct that the court determined to be true. Id. 1135. The charged conduct for which Defendant/ Petitioner Maldonado was indicted only covered March through April of 2002.

In the instant case, the court appears to have determined that Defendant/Petitioner had possessed drug trafficking money and/or engaged in drug trafficking as far back as August 2001. See, Government's Exhibit 1 to agent Elizondo's testimony at sentencing. This is conduct for which Defendant/Petitioner had not been charged under the indictment. At the suppression hearing Defendant/ Petitioner was not even asked about August 2001 (pre-indictment) activity, and there certainly is no evidence he denied it either.

Moreover, Defendant/Petitioner's stipulation of facts contained in the "factual basis," supplemented his written statement to the probation department. It clearly presents a full and detailed admission of the facts supporting the charged offense. Defendant/Petitioner never falsely denied nor frivolously contested the additional relevant conduct as

required under the *Patino* analysis or the commentary addressing U.S.S.G. Section 3E1.1.

The district court's conclusion that Defendant/ Petitioner Maldonado either falsely denied or frivolously contested the relevant conduct is simply without foundation. The relevant conduct on which the court based its decision was never specifically addressed as offense conduct in either the indictment or in the factual basis for the plea. A review of the sentencing transcript clearly reveals that at no time did this Defendant/Petitioner deny or contest the additional relevant conduct of August 2001.

Defendant/Petitioner has complied with the requirements contained in U.S.S.G. Section 3E1.1. In the case at bar, as in *Patino* there is reversible error where no foundation for the court's decision is present.

III. WHETHER THE TRIAL COURT ERRED BY SENTENCING DEFENDANT/PETITIONER TO A TWO LEVEL UPWARD ADJUSTMENT FOR OBSTRUCTION OF JUSTICE UPON FINDING DEFENDANT/PETITIONER HAD LIED DURING THE SUPPRESSION HEARING.

ARGUMENT

This appeal on the issue of obstruction of justice is taken pursuant to 18 U.S.C. Section 3742(A)(2). According to Fifth Circuit case law, a district court's interpretation or application of the sentencing guidelines are reviewed de novo, and its factual findings, are reviewed for clear error. See *U.S. v. Huerta*, 182 F.3d 361,364 (5th Cir.1999). However, as here where the district court had no basis on which to make its guideline application of the obstruction enhancement, a factual finding issue is not present. Thus, the appropriate standard upon which the lower court's ruling should be reviewed is the de novo standard. See *U.S. v. Ford*, 996 F.2d 83 (5th Cir.1993), *U.S. v. Marsh*, 963 F.2d 72 (5th Cir.1992); and *U.S. v. McKinney* 53 F.3d 664 (5th Cir.1995). In *U.S. v. Siciliano* 953 F.2d 939 (5th Cir.1992), and *U.S. v. Shipley* 963 F.2d 56 (5th Cir.1992), where the reviewing court, as here was faced with a situation where questions of fact and law must be considered, the reviewing standard applied was the de novo standard.

The reviewing court is mandated by 18U.S.C. Section 3742(e) to review factual findings de novo, and to reverse a sentence if imposed as a result of an incorrect application of the sentencing guidelines even when the basis below was

reasonable. See *Mejia-Orosco* 867 F.2d at 218 & 18 U.S. C. Section 3742(f)(1).

In the instant case the Defendant/Petitioner seeks a reversal of the sentence imposed due to the district court's failure to properly apply U.S.S.G. 3C1.1. The court below failed to make specific findings of perjury in the instant case. This incorrectly applies the guideline section, and fails to afford this reviewing court an opportunity to determine whether or not a proper foundation existed upon which an enhancement under U.S.S.G. Section 3C1.1 could be made.

The Supreme Court case upon which this circuit relies in determining the proper application of U.S.S.G. Section 3C1.1 is the decision in *U.S. v. Dunnigan*, 507 U.S. 87 (1993). A Fifth Circuit case that is analogous to the instant case is *U.S. v. Humphrey* 7 F3d 1186 (5th Cir.1993). In *Humphrey,* the government sought appellate review of the district court's decision to not impose U.S.S.G. Section 3C1.1. This circuit's opinion in *Humphrey* specifically stated that, "if the district court made an arbitrary decision to not enhance Humphrey's sentence, without considering whether *Humphrey* committed perjury, it has committed reversible error. The application of Section 3C1.1 is not discretionary." Like in the instant case, an objection to the PSR with respect to the application of the Section 3C1.1 was filed. According to the court in *Humphrey* once an objection is filed as to the application of an adjustment under Section 3C1.1, the district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition set forth under U.S.S.G. Section 6A1.1.

Based on the holding in *Dunnigan*, the *Humphrey* court also relied on the mandate prescribed by Fed.R.Crim. P. 32(c)(3)(D), which provides that where a defendant alleges any factual inaccuracy in the presentence report, the district court must "(I) make a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing." See *Humphrey* at 1190. In the instant case, the Defendant/Petitioner objected to the Section 3C1.1 adjustment and requested specificity from both the probation department, and the court as reflected by the sentencing transcript.

In the instant case, the district court imposed a Section 3C1.1 upward adjustment. Therein the district court simply states that it believes lies were told by the Defendant/Petitioner during the suppression hearing without specifically addressing the Defendant/Petitioner's objection as to what specific statement constituted the perjury.

A similar statement by the court as to a Section 3C1.1 adjustment was held to be insufficient in *U.S. v. McGiffen*, 267 F.2d 581 (7th Cir.2001). In *McGiffen*, the court simply stated, "I thought your testimony was riddled with inaccuracies and lies." There the reviewing court, citing *Dunnigan* held that since the court below never identified which of the defendant's statements it considered to be lies and why, there could be no basis for a finding of perjury. Perjury requires a finding of a willful impediment to, or obstruction of justice or an attempt to do the same. The specific findings by the court below are the only measure by which a reviewing court can ensure that not every instance of alleged false testimony under oath

warrants the obstruction enhancement. Thus, the district court must review the evidence and make specific findings of fact to support perjury in order to support the enhancement. See, *McGiffen* at 591. Among the findings required are that the Defendant/Petitioner's misrepresentations were willful and material to the investigation of prosecution of the instant offense, and made with specific intent to obstruct justice rather than as a result of confusion, mistake or faulty memory. See *Dunnigan* at 94-95. The same analysis was applied in *U.S. v. Seward*, 272 F.2d 831 (7th Cir.2001) where the reviewing court held that a district court's statement that it believed the defendant was "being untruthful," did not rise to the *Dunnigan* requirement of specificity. Simply stating that the defendant's testimony was "peppered with untruths," without identifying any particular statement it believed to be false made it impossible for the reviewing court to assess whether the district court's errors were harmless. *U.S. v. Seward*, 272 F.2d 831, 839.

The holding in *Dunnigan*, along with Sections 3C1.1, and Section 6A1.3, and Fed.R.Crim.Proc.32(c)(3)(D), require the district court to make specific findings of perjury prior to imposing an obstruction upward adjustment. Failure of the district court to adhere to the specificity requirement makes it impossible for this court to accomplish its role as the reviewing court. In this case the sentencing transcript reflects an application of the enhancement without specific foundation. As late as the sentencing hearing, the government was stills saying it would take them a half hour to point out the untrue statements Defendant/Petitioner made at the suppression hearing.

CONCLUSION

Based on the foregoing, the district court's order denying Defendant/Petitioner's motion to suppress should be reversed. The district court's order denying Defendant/ Petitioner acceptance of responsibility, and imposing obstruction o f justice should also be reversed. Defendant/ Petitioner further pleads for all other relief to which he may be entitled.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINION AND ORDER,
FILED FEBRUARY 23, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-40448
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DAGOBERTO MALDONADO, JR.,
also known as Apache,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas
USDC No. L-02-CR-600-1

Before HIGGINBOTHAM, DAVIS, AND PRADO, Circuit Judges.

PER CURIAM:

Dagoberto Maldonado, Jr., appeals from his bench-trial conviction and sentence for conspiring to launder monetary instruments and laundering monetary instru-

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

ments. He first argues that the district court erred in denying his motion to suppress evidence obtained from the search of his home. He specifically challenges the district court's finding that his consent was an act of independent free will. After close examination of the underlying facts, this court holds that the district court did not err in finding that Maldonado's consent was an act of independent free will. See United States v. Kelley, 981 F.2d 1464, 1471-72 (5th Cir. 1993).

Maldonado argues that the district court erred by failing to decrease his sentence for acceptance of responsibility, pursuant to U.S.S.G. §3E1.1. As Maldonado has failed to show that the district court's denial of an adjustment for acceptance of responsibility was without foundation, that denial must be affirmed. See United States v. Anderson, 174 F.3d 515,525 (5th Cir. 1999).

Maldonado also argues that the district court's application of an upward adjustment for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, to his sentence was erroneous because the district court's findings that the adjustment was warranted by Maldonado's perjured testimony at the suppression hearing were insufficiently specific. Close examination of the record shows that the district court made sufficiently specific findings regarding the adjustment for obstruction of justice. See United States v. Storm, 36 F.3d 1289, 1295 (5th Cir. 1993).

Accordingly, the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
AT THE LAREDO DIVISION

MEMORANDUM AND ORDER,
FILED OCTOBER 18, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**CRIMINAL**
	§	**N. L-02-600**
DAGOBERTO MALDONADO	§	

MEMORANDUM AND ORDER

Pending before the Court is Defendant's Motion to Suppress, which was the subject of testimony and argument on September 20, and September 24, 2002. For the reasons that follow, the Motion to Suppress is DENIED.

Factual Background

As a result of various surveillance activities, Laredo Police officers Jorge Medina and Martin Cuellar witnessed two men roll a tire from a residence at 126 Beltran Loop, Laredo, Texas, and load it onto a pick-up truck shortly after noon on April 4, 2002. The truck drove away but was soon stopped by other Laredo Police officers. A search of the tire led to the discovery of $294,000 wrapped in rubber bands within the tire.

Laredo Police Officers Adan Hernandez and Juan Rivera continued surveillance at 126 Beltran Loop. The officers involved in the traffic stop alerted Officers Hernandez and Rivera to their discovery. However, Officers Hernandez and Rivera believed that drugs, not currency, had been found. It is not contested that the

government had probable cause to obtain a warrant to search the residence at 126 Beltran Loop that afternoon. It is also not contested that the government neither sought nor obtained a search warrant. Further, no exigent circumstances existed that would necessitate a warrantless search of the residence.

After existing their vehicles parked on the street in front of the house, Officers Hernandez and Rivera approached the house via the north driveway in an attempt to obtain consent from the owner for a search of the residence. While walking in front of the residence, Officers Hernandez and Rivera encountered Medor Garcia, who was present at the residence on business, and Sergio Maldonado, Defendant's brother. The officers asked the men to point them toward the owner of the house. The men indicated that the owner was toward the back of the residence. In their testimony, Officers Hernandez and Rivera said the men pointed toward the backyard. As will be discussed later, this residence has no backyard in the traditional sense, and certainly no yard other than the front yard is visible from where the officers and other men were standing. Thus, the men must have been pointing toward or beyond the house, and toward the west.

Officer Hernandez remained in front of the house in the driveway while Officer Rivera walked into the enclosed driveway toward a door. This door, the only door to the inner structure,[1] was accessible only by entering the covered driveway. This covered driveway is more

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[1] We note that this residence consists of multiple structures built around a trailer home. By inner home, we mean the original trailer home component of this compound.

appropriately considered a garage, but without a large front garage door. This garage, was not only covered with a permanent superstructure, but was also enclosed by a decorative brick wall[1] on the north side. On the south side of the garage, the wall of the inner structure served to further enclose the area. There was a separate wall to the west at the end of the garage, connected to the brick wall to the north and with a narrow opening leading to a courtyard on the south end of the wall. Only the east side of the garage facing the street was open.

Officer Rivera continued past the door to the interior structure without knocking or otherwise attempting to obtain consent to be on and search the premises. Officer Rivera walked to the end of the garage where he could look into the courtyard through the small opening between the walls. At that point, Officer Rivera observed Defendant in

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[2] The government's exhibits 6 and 7, photos taken of this area, show that a jet ski and other boxes and materials were stored in the garage at the time, further supporting this Court's conclusion that this area was far more private than an open driveway.

[3] We note that this wall ran the length of the garage. However, the wall is better described as decorative rather than protective. It was not bricked floor to ceiling, but rather had large openings. Nonetheless, a reasonable person would realize that this wall was present to delineate the garage and enclose it.

[4] The government and Defendant repeatedly referred to this uncovered area as the backyard of the house. We find the term courtyard to be a more accurate description. The courtyard is surrounded on all sides by covered structures. Only part of the courtyard area is visible from above. It appears that at this residence there is no backyard in the

the courtyard and observed nothing else of note. Officer Rivera indicated to Defendant that he wanted to speak with Defendant. Defendant acquiesced and left the courtyard. Officer Rivera and Defendant walked out of the garage into the front yard. The time between Officers Hernandez and Rivera approaching the house on foot and their addressing Defendant in his driveway was a brief few minutes at most.

While in the front driveway area, Defendant indicated that he was the owner of the home. The officers requested permission to search the premises. Defendant consented and thereafter signed a standard consent to search form. The officers then began a search of Defendant's home. The search uncovered the evidence Defendant seeks to suppress.

While search the residence, the government agents discovered laptop computers. An agent booted-up one of the computers for approximately two minutes. Afterward, a warrant was obtained granting permission for the government to search the computers found at the residence.

Defendant contends that Officer Rivera's entry into the curtilage of Defendant's property was a search in violation of the Fourth Amendment. Defendant further contends that the consent was the direct result of the

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traditional sense. The walled, roofed enclosure abuts the property line to the north, west, and south. The expectation of privacy in this courtyard is substantially greater than that of a backyard open to the world. It is, in fact, substantially greater than an open backyard fenced-off from the surrounding area. This courtyard was entirely surrounded by structures that together made up the residence.

alleged Fourth Amendment violation and must be suppressed under the fruit of the poisonous tree doctrine. Defendant next contends that Defendant's written consent was not granted voluntarily. Finally, Defendant contend that the government's initial boot-up of one of the computers at the residence was improper and the warrant subsequently issued to search the contents of the computers on the premises was invalid. Defendant seeks to suppress all evidence contained on the computers seized from the residence.

The government contends that Officer Rivera's initial entrance into Defendant's curtilage was permissible. The government further contends that Defendant's consent to the search of his home was invalid. Finally, the government contends that the warrant and subsequent search of Defendant's computer was proper. Accordingly, the government concludes that none of the evidence obtained at Defendant's residence should be suppressed.

Analysis

"It is a 'basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) *citing Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 477-78 (1971). However, a search undertaken with valid consent is permissible under the Fourth Amendment. *See Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991) ("Thus, we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so."). "The Government has the burden of proving by a

preponderance of the evidence that a consent to search was voluntary." *United States v. Cooper*, 43 F.3d 140, 144 (5th Cir. 1995).

When consent to search a residence follows on the heels of a Fourth Amendment violation, however, the government must also prove that the evidence was not a product of the violation. "Under the fruit of the poisonous tree doctrine, all evidence derived from the exploitation of an illegal search or seizure must be must be suppressed, unless the government shows that there was a break in the chain of events sufficient to refute the inference that the evidence was a product of the constitutional violation." *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998).

The search of Defendant's home that yielded the evidence that Defendant seeks to suppress was predicated upon his written consent. Defendant claims that, before this consent was granted, the government violated Defendant's Fourth Amendment right against unreasonable search and seizure. Specifically, Defendant argues that Officer Rivera's initial incursion into his curtilage was a warrantless search in violation of the Fourth Amendment. Whether there was a Fourth Amendment violation prior to the consent is instructive as to the tests this Court must apply to determine the validity of the consent. Thus, we first address whether Officer Rivera's initial incursion was a Fourth Amendment violation.

Police search in violation of the Fourth Amendment

We find that Officer Rivera did violate Defendant's Fourth Amendment right to be free from unreasonable search and seizure when he walked passed the door to the inner structure at the residence and continued to the opening leading to the residence courtyard. Generally, the curtilage surrounding a home is entitled to protection from unwanted governmental intrusions. *See Dow Chemical Co. v. United States*, 476 U.S. 277, 235-36 (1986). The entire garage area fits within the definition of curtilage.[6]

Officer Rivera admits that when he entered the garage he was looking for the owner of the house, a person he suspected of drug trafficking. Defendant assumes Officer Rivera was also seeking to obtain evidence. In either case, Officer Rivera was undertaking a search.

The Fifth Circuit has recognized that police have the right to approach the front door of a residence in order to locate the owner to seek permission for a search. *See Thomas*, 120 F.3d at 571. Other circuits have recognized a police officer's right to go around to the back or side door

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[6] "The 'curtilage' constitutes the area within which a person reasonably may expect that the area in question should be treated as the home itself. In determining whether an area outside the home is curtilage, we must consider four factors: the proximity of the area to the home, whether it is within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from outside observation." *United States v. Thomas*, 120 F.3d 564, 571 (5th Cir. 1997) (internal quotations and citations omitted).

of a home to search for the owner if no answer is received at the front door. The Fifth Circuit has not recognized an

[7] The government cites several cases standing for this proposition. The government overstates the relevant holding in *United States v. Bradshaw*. 490 F.2d 1097 (4th Cir. 1994). The holding in *Bradshaw* was not, as the government suggests, that police have blanket authority to enter a person's backyard in an attempt to speak to him. *See* Response of United States to Defendant's Motion to Suppress, September 15, 2002, at 9-10. Rather, the Fourth Circuit allowed the police to enter an individual's backyard only to inquire about a truck located off premises. Further, this exception was limited to entry of the premises for a legitimate reason "unconnected with a search of such premises directed against the accused." *Bradshaw*, 490 F.2d at 1100.

"We conclude that the agents entered an area with respect to which the defendant had a reasonable expectation of privacy protected by the fourth amendment when they came onto his premises. However, the agents had a legitimate reason for this incursion unconnected with a search of such premises directed against the accused. They were clearly entitled to go onto defendant's premises in order to question him concerning the abandoned vehicle near his property. Furthermore, we cannot say that [the Agent] exceeded the scope of his legitimate purpose for being there by walking around to the back door when he was unable to get an answer at the front door." *Id.* (footnote omitted). By quoting only the last two lines of the relevant paragraph, the government overstates the relevant holding. *See* Response of United States to Defendant's Motion to Suppress, September 15, 2002, at 10.

The government also relies on the holding in *United States v. Daoust*. 916 F.2d 757 (1st Cir. 1990). "In [attempting to interview an individual], [a police officer] obviously can

exception allowing police to enter a backyard or side yard

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go up the door, and, it seems to us, if that door is inaccessible there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person." *Id.* at 758. The holding in this case was conditional, and the condition was not met in the instant case. In this case the officer did not attempt to use the only door to the house. He walked by it. Additionally, this door was not inaccessible necessitating Officer Rivera to go beyond that door.

The government's reliance on *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993), is also misplaced. In *Garcia* the Ninth Circuit found it to not be a constitutional violation for police officers to be on the back porch of an apartment because, "The officers reasonably believed that they were at the main entrance to [the apartment]." *Id.* at 1279. Further, "the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling." *Id.*at 1280. Officer Rivera did not believe he was going to the main entrance of Defendant's residence when walked past the door to the house.

The final case the government relies upon in urging this Court to apply an exception to the general protection afforded the curtilage of one's home is *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977). "We cannot say that the agents' action in proceeding to the rear after receiving no answer at the front door was so incompatible with the scope of their original purpose [to find the owner of a barking dog] that any evidence inadvertently seen by them must be excluded as the fruit of an illegal search." *Id.* at 1300. As noted before, Office Rivera did not attempt to receive an answer at the door.

to knock on a backdoor to obtain the owner's consent to search.

The government urges this Court to follow the lead of other circuits and recognize that, for the limited purpose of searching for the owner to request permission for a search, police may enter the backyard of a home. The government claims that Officer Rivera acted in a manner consistent with such an exception as outlined in other circuits. Without taking a position as to whether the Fifth Circuit would allow for such an exception to the general protection afforded the curtilage, we find that, even under the most expansive reading of this exception as it exists in other circuits, Officer Rivera's actions fall outside of this exception and violate the Fourth Amendment.

Had Officer Rivera stopped and knocked on the door to the interior of Defendant's home not continuing past the door, he would have been safety within Fifth Circuit precedent permitting police to knock at the front door of a residence because this house does not have a traditional front door. In the instant case, however, Officer Rivera walked a significant distance beyond the door and went well into an area within which any reasonable person would recognize the owner to have an extremely high expectation of privacy. Officer Rivera went farther into the curtilage than the other circuit courts contemplated when they created the exception allowing police to enter a yard to reach a backdoor. We decline to extend an exception not yet recognized in this circuit beyond the limits defined in other circuits. Thus, Officer Rivera violated Defendant's Fourth Amendment rights.

Immediately after the Fourth Amendment violation, Defendant was brought to the front of the home. By Officer Rivera's own testimony, Defendant's consent was obtained within minutes of this intrusion. As such, the events leading to Defendant's consent were related to the Fourth Amendment violation.

Validity of consent

Consent granted after a Fourth Amendment violation can be sufficient to nullify the Fourth Amendment violation and allow for the admissibility of evidence gathered during the subsequent search. "[W]hen we evaluate consent given after a Fourth Amendment violation, the admissibility of the challenged evidence turns on a two-pronged inquiry: whether the consent was voluntarily given and whether it was an independent act of free will. Voluntariness focuses on coercion, and the second prong considers the casual connection between the 'consent' and the prior constitutional violation." *United States v. Dortch,* 199 F.3d 193, 201 (5th Cir. 1999). "Where there has been a prior constitutional violation, the government's burden to prove that the defendant consented becomes all the more difficult." *Id.*

Voluntariness of consent

We find that Defendant's written consent to the search of his home was voluntary. "This court considers six facts in evaluating the voluntariness of consent to search, all of which are relevant, but no one of which is dispositive or controlling." *United States v. Solis*, 299 F.3d 420, 436 (5th Cir. 2002). The factors are: "(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive

police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found." *Id.* at n.21 (internal quotations and citations omitted).

An analysis of the voluntariness of the defendant's custodial status, the first factor, is inconclusive. The government maintains that Defendant was free to move about as he wished until he was placed under arrest hours after the consent to search was rendered. Defendant's position is that he was escorted from the courtyard to the front yard and was not free to do so as he pleased. It is true that Defendant was apparently free to stop his encounter with the police at any time. Further, Defendant left the courtyard voluntarily. However, in this case, Defendant's ability to leave at will was of little relevance because Defendant was already at his home. Thus, while Defendant was not in custody in any real sense, the police actions certainly restricted Defendant's freedom of movement.

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[8] As this Court has noted in the past, this test is, "like many other multi-factor tests, redundant, incomplete, and unclear ... No indication is given of how the factors are to be weighed in the event they don't all line up on one side." *Exacto Spring Corp v. Commissioner*, 196 F.3d 833, 835 (7th Cir. 1999) (internal quotations and citations omitted). Nonetheless, this Court will address the six factors and use them as the basis for the determination of the voluntariness of Defendant's consent.

The second factor, the presence of coercive police procedures, was the most contested of the factors addressed at the suppression hearing. In this case, it is also the most relevant and important factor. Defendant claims that the armed police threatened to take away his wife and children unless he signed the consent form. In light of the testimony presented by both sides at the suppression hearing, we find this claim to be unsupported. The evidence leads this Court to conclude that Officers Hernandez and Rivera acted in a relaxed, almost friendly manner, with the hope of persuading Defendant that he should consent to the search. We find that there were no coercive police procedures. Thus, the second factor weighs in favor of the government.

The third factor, the extent and level of the defendant's cooperation with the police, also weighs in favor of the government. Defendant did not refuse to sign a statement of rights after he was arrested. However, during the relevant period leading up to his consent, Defendant was quite cooperative with the police. The police told Defendant that they were looking for drugs. Apparently because he knew there were no drugs in the house, Defendant laughed and cooperated. The evidence indicates that Defendant was cooperative with police until well after consent was granted and the search was executed.

The fourth factor, Defendant's awareness of his right to refuse consent, also weighs in the government's favor. Defendant signed a consent form, written in Spanish and understood by Defendant. The consent form indicated that Defendant had the right to refuse the search. Nothing said or done by the police casts doubt on this conclusion.

The fifth factor, Defendant's education and intelligence, is another draw. Defendant has only nine years of formal general education in Mexico. However, he had specialized electrical training in the United States. Defendant maintains that he ran a successful business. The government claims he was a money launderer. Without taking a position on this issue, it is clear that, under either scenario, a significant degree of intelligence is required. Because this factor is vague as to what constitutes education and intelligence and because this factor is presumably intertwined with whether Defendant knew of his right to refuse consent, we consider this factor to be neutral. To the extent this factor should weigh in favor of one side over the other, the weight is slight and not especially relevant to the overall determination in this case.

The final factor, defendant's belief that no incriminating evidence will be found, weighs in favor of the government. Defendant believed that the police were searching for drugs. Defendant knew that no drugs were present in the home. Defendant did know that more than $1 million in cash was in the house, but thought that most of it was well hidden. Whether Defendant thought that some or all of the money would be found, the evidence indicates that Defendant did not think anything incriminating would be found.

Of the six factors this Court must examine to determine the voluntariness of consent, the government wins four, while two are a draw. Most importantly, there were no coercive police practices that weigh against the government. As such, under the six-factor test, the consent granted by Defendant for the search of his house was voluntary.

Independent act of free will

Because Defendant's written consent followed on the heels of a Fourth Amendment violation, we must also determine whether the consent was an independent act of free will. We find that it was. "Under the second prong of the consent inquiry, we consider the three factors to determine whether the casual chain was broken: (1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose of flagrancy of the initial misconduct." *Dortch,* 199 F.3d at 202.

The first factor, the temporal proximity of the illegal conduct and the consent, weighs in favor of Defendant. At the suppression hearing, Defendant's position was that more than 10 to 15 minutes elapsed before the consent to search was signed. The government argued that period of time was only a few minutes at most. We conclude that the time between Officer Rivera's first encounter with Defendant and Defendant's execution of the consent form was only a few minutes. Thus, time alone weighs against a finding that the casual chain was broken.

The second factor, the presence of intervening circumstances, weighs substantially in favor of the government. Defendant read and signed the search consent form. This was an intervening circumstance that indicates that the casual chain was broken. The consent form itself indicated that Defendant could refuse to search. The form was clear that this was a choice Defendant was making voluntarily. We have already explained that the consent itself was voluntary. The nature of the consent, a signature

on a form outlining Defendant's rights, was a significant intervening event.

Finally, the third factor, the purpose and flagrancy of the initial misconduct, also weighs in favor of the government. Though we do not minimize the severity of all illegal police intrusion into private areas of a residence, the harm in this case was light. Officer Rivera did not look around the area extensively and encountered no incriminating evidence. Officer Rivera saw Defendant within seconds of approaching the courtyard. Officer Rivera was unconstitutionally present in the protected curtilage of Defendant's home for only a moment. Further, Officer Rivera was not flagrant in committing this violation. Though he should have been aware that he was in an area with a high expectation of privacy, Officer Rivera did not intend completely to ignore the consent or warrant requirement as evidence by the fact, that soon after the violation, Officer Rivera requested Defendant's consent to search. The facts in this case indicate that the nature of the violation would not cause Defendant to act in a manner other than independently and of his own free will in signing the consent form.

Government met burden of showing validity of consent

Because the written consent was voluntary and free of the taint of the Fourth Amendment violation, we find that the consent given by Defendant created a sufficient basis for a warrantless search of the residence. Because the government was adamant that no Fourth Amendment violation occurred, the government neglected to argue in the alternative that, in the event that this Court found a Fourth Amendment violation occurred, the written consent

broke the casual chain otherwise tainting the evidence. Nonetheless, the government has unwittingly carried this heavier burden. The evidence obtained through the search of Defendant's residence is admissible at trial.

Admissibility of evidence contained in computers seized at Defendant's home

We now address the evidence in the form of data within the computers found at the residence. Defendant seeks to suppress this evidence. The search warrant issued by the magistrate judge authorizing the search of the computers was based upon probable cause created by, among other things, the discovery of more than $1 million in cash within the house.

The government agent operating the computer for nearly two minutes may have fallen outside the scope of Defendant's consent[9] and did precede issuance of the search warrant. However, this alone does not preclude use of evidence found on the computers since no material evidence was obtained prior to the issuance of the search warrant.

Thus, the question is not whether evidence obtained during the illegal search is admissible, but whether any evidence discovered from the computers after the search

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[9] We do not address this factual question concerning the scope of consent because the undisputed and easily resolved facts support a dispositive resolution. We assume, for the sake of argument, that by the government turning on the computer prior to the warrant being issued, there was a Fourth Amendment violation.

warrant is admissible. We find that, under the independent source doctrine, the evidenced discovered on the computers after issuance of the warrant is admissible.[10]

Evidence discovered through an illegal search is free of the taint of the search and not subject to suppression if the evidence is also discovered through an independent source, such as a search warrant, not itself tainted by the illegal search. *See United States v. Restrepo*, 966 F.2d 964, 969-70 (5th Cir. 1992). Evidence obtained through a search of a computer pursuant to a valid search warrant need not be suppressed automatically because the government illegally searched the computer before the warrant was issued. *See United States v. Grosenhieder*, 200 F.3d 321, 327-28 (5th Cir. 2000). For such evidence to be admissible, the illegal search may not serve as the motivation for requesting the warrant, and the Magistrate may not be presented with or tainted by evidence obtained by way of the illegal search. *See* Id. In the instant case, no evidence was obtained during the illegal search, other than the computers were operable and ran Windows operating system software. The illegal search did not serve as the government's motivation to seek the warrant, especially in light of the other items found at the residence. No evidence in any way related to the initial search, even that the computers were operable, was presented to the magistrate. The warrant was not tainted, and in all other ways the warrant was also valid. Thus, all of the evidence discovered as data within the computers is admissible at trial.

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[10] This necessarily means that all of the evidence found on the computers is admissible.

Conclusion

Defendant's consent to search his residence was sufficient basis for the search that led to the discovery of the evidence Defendant seeks to suppress. Additionally, evidence obtained from the computers seized at Defendant's residence is also admissible. Accordingly, Defendant's Motion to Suppress is DENIED.

IT IS SO ORDERED.

SIGNED this 18th day of October 2002.

/S/
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE